IN THE HIGH COURT OF DELHI

WRIT PETITION (CIVIL) NO. 9224 OF 2006

Date of decision: 7th August, 2006.

Union of India .....Petitioner
through: Mr.Atul Bandhu, advocate.

Versus

Prakash Chand & Ors. .....Respondents.
through: Nemo.

Coram :

Hon'ble Mr.Justice Manmohan Sarin.
Hon'ble Ms.Justice Aruna Suresh.

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not? ✓ yes

(3) Whether the judgment should be reported in the Digest ? ✓ yes

Aruna Suresh, J.

1. The petitioner, Union of India, aggrieved by the order dated 15.12.2005 of the Central Administrative Tribunal (in short the Tribunal), Principal Bench, Delhi, has assailed the same before us in the present writ petition. By virtue of the said order dated 15.12.2005, the Tribunal was pleased to quash the order dated

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19.1.2004 issued by the Ministry of Small Scale Industries whereby financial upgradation under the Assured Career Progression (in short ACP) Scheme granted to respondents in the scale of Rs.5500-9000 was down graded in the scale of Rs.5000-8000, in view of the clarification No.56 under the ACP Scheme issued by Deptt. of Personnel and Training (in short DOPT) on 18th July,2001. The Tribunal restored the financial benefits granted to respondents by way of granting them ACP in the scale of Rs.5500-9000 with consequential recoveries.

2. Respondents were appointed as Lower Division Clerks (LDCs) with Small Industries Service Institute, Ministry of Small Scale Industries, Udyog Bhawan, New Delhi. They were promoted as Upper Division Clerks (UDCs) in the pay scale of Rs.4000-6000/-. As per the existing hierarchy, under the recruitment rules the applicants are to be promoted to the post of Superintendent in the pay scale of Rs.5500-9000/-.

3. By virtue of Vth Central Pay Commission recommendations for ACP Scheme had been introduced. Deptt. of Personnel and Training vide Office Memo No.35034/1/97-Estt.(D) dated 9.8.99 issued guidelines for the implementation of ACP. As per condition No.7 of the Scheme financial upgradation shall be

given to the next higher grade in accordance with the existing hierarchy in a cadre/ category of post without creating new posts for the purpose. For the sake of convenience condition No.7 is reproduced below:-

> "7. Financial upgradation under the Scheme shall be given to the next higher grade, in accordance with the existing hierarchy in a cadre/ category of posts without creating new posts for the purpose. However, in case of isolated posts, in the absence of defined hierarchical grades, financial upgradation shall be given by the Ministries/ Departments concerned in the immediately next higher pay-scales as indicated in ANNEXURE-II which is in keeping with Part-A of the First Schedule annexed to the Notification dated September 30,1997 of the Ministry of Finance (Department of Expenditure). For instance incumbents of isolated posts in the pay Scale S-4, as indicated in Annexure-II will be eligible for the proposed two financial upgradations only to the pay-scale S-5 and S-6. Financial upgradation on a dynamic basis (i.e. without having to create posts in the relevant scales of Pay) has been recommended by the Fifth Central pay Commission only for the incumbents of Isolated Posts which have no avenues of promotion at all. Since financial upgradations under the Scheme shall be personal to the incumbent of the isolated post, the same shall be filled at its original level (pay-scale) when vacated. Posts which are part of a well-defined cadre shall not qualify for the ACP Scheme on `dynamic' basis. The ACP benefits in their case shall be granted conforming to the existing hierarchical structure only."

4. The petitioner before us decided to implement the ACP Scheme and accordingly placed the respondents in the next hierarchical grade in accordance with the existing hierarchy.

Since there were some doubts in the mind of the State, clarifications were sought. DOPT issued clarificatory Office Memo. dated 18.7.2001. Vide clarification No.56 it was clarified that in respect of common category posts like UDCs, Assistants and Superintends, the hierarchies that exists on all-India basis should be taken into account and not the hierarchies which exist in a particular office for the purpose of granting ACP benefit. It was further clarified that in Small Industries Development Organization UDCs have been granted ACP benefit with respect to next higher post of Superintendent in the pay scale of Rs.5500-9000/-. This benefit is required to be reviewed and rectified by granting them ACP benefit in the next higher post of Assistant in the subordinate office of Government of India in the scale of Rs.5000-8000 by taking into account All India hierarchies of such common category posts. It was further observed that this rectification shall be effective from 9.8.1999 or the date from which the concerned employee had been granted actual ACP benefit in the scale of pay of Rs.5500-9000 whichever was later.

5. Vide its order dated 19.1.2004, the Ministry of Small Scale Industries rejected the representation of the respondents and ordered that ACP benefits originally in the scale of Rs.5500-9000 shall be deemed to have been accepted in the modified form

to provide grant of ACP in the scale of Rs.5000-8000. Accordingly the pay scale of respondents was refixed in the lower grade of Rs.5000-8000 with the order of recovery of excessive amount paid, if any. This resulted in filing of OA No.557/2004 by respondents in the Central Administrative Tribunal, Principal Bench. By virtue of this application, applicants assailed the order dated 19.1.2004 whereby financial upgradation under the ACP granted to them in the scale of Rs.5500-9000 was down graded in the scale of Rs.5000-8000, in the light of clarification No.56 under the ACP Scheme, issued by DOPT on 18.7.2001. They sought setting aside of the order dated 19.1.2004.

6. The matter was referred to the Full Bench of the Tribunal for a decision on whether clarification No.56 issued by DOPT on 18.7.2001 would have an effect of rendering condition No.7 of the ACP Scheme redundant and taking away the right accrued to a government servant in his hierarchy to be granted financial upgradation under ACP Scheme. This reference was considered by the Full Bench of the Tribunal. Vide its detailed order dated 16.2.2005 the above reference was answered as follows:-

> " Clarification No.56 issued by the Department of Personnel & Training on 18.7.2001 will have the

effect of rendering condition No.7 of the ACP Scheme as redundant. It cannot take away the right that has accrued to the Government servant in his existing hierarchy with respect to the grant of the scale to be granted by way of financial upgradation."

7. On the basis of this answer the Division Bench of the Tribunal proceeded with the O.A. and vide its order dated 15.12.2005 observed as follows:-

> " In the light of the aforesaid Full Bench decision, Clarification No.56 issued by DOPT on 18.7.2001 having been made ineffective, condition No.7 of the ACP Scheme stands revised and the right accrued to the applicant in his hierarchy for grant of financial upgradation under ACP Scheme restored. As such, Annexure A-1 dated 19.1.2004 is quashed and set aside and respondents are directed to restore financial upgradation to the applicants in scale Rs.5500-9000 w.e.f. 10.5.2002 as accorded to them originally. Applicants shall be entitled to consequential benefits. O.A. is allowed accordingly."

8. It is an admitted case of the petitioner that in view of the decisions of Guwahati, Kolkata and Jabalpur benches of the Central Administrative Tribunal, the recovery has been rendered illegal and therefore the petitioner had accepted in principle foregoing of recovery from the respondents.

9. Learned counsel for the petitioner submits that Tribunal failed to appreciate that ACP Scheme was administrative in nature and clarification of instructions issued thereon obviating

the points of the doubts would not render it illegal and arbitrary per se. A person becomes entitled to the next financial upgradation based on existing hierarchy in a particular cadre in respect of next higher pay scale available in the service as per the unamended para 7 annexed as Annexure-1 to Office Memo. Dated 9.8.1999. It was further pointed out that quashing of clarification of Office Memo by the Tribunal would result into financial upgradation in terms of ACP Scheme depending upon next promotional post in a particular office irrespective of the fact that in any other office the next promotional post might be different and might be attracting higher or lower pay scale resulting into different financial upgradations amongst employees of a common service and similarly situated in all respects.

10. The fact remains that the effect of DOPT Office Memo. Dated 18.7.2001 and clarification No.56 if implemented would take away the vested right of the government servant in his existing hierarchy with respect to the grant of scale to be granted by way of financial upgradation under the ACP Scheme. The Government cannot amend or supersede statutory rules by administrative instructions. But if the rules are silent on any particular point, the government can fill up the gap and supplement the rules and issue instructions not inconsistent with

the rules already framed and these instructions shall govern the condition of service.

11. In the case Director General of Posts & Ors. Vs. B.Ravindran & Anr. (1997) 1 SCC 641, in some what similar situation Supreme Court observed that the Government could not have, under the guise of a clarificatory order, taken away the right which had accrued to such re-employed pensioners with retrospective effect by declaring that while considering hardship the last pay drawn at the time of retirement was to be compared with the initial pay plus pension whether ignorable or not. The Supreme Court further observed clarificatory instructions cannot supersede or take away the right itself under the regulations sought to be clarified.

12. In the instant case clarification No.56 had been issued to clarify the provision/ condition contained in the ACP Scheme, therefore, this clarification cannot supersede the basic provision and condition specified in the Scheme for grant of benefits.

13. In these circumstances we do not find any illegality in the reference order dated 16.2.2005 and the subsequent order dated 15.12.2005 whereby the order of the Government of India,

Ministry of Small Scale Industries dated 19.1.2004, was quashed and set aside. The writ petition is, accordingly, dismissed.

(Aruna Suresh)
Judge

(Manmohan Sarin)
Judge

August 7th ,2006
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